UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZANGO, INC., Plaintiff, v. PC TOOLS PTY LTD., Defendant.	CASE NO. C07-0797-JCC ORDER

I. INTRODUCTION

This matter comes before the Court on Defendant's Motion to Dismiss for Lack of Personal Jurisdiction. (Dkt. No. 17.) After considering the parties' relevant submissions on the matter and determining that oral argument is unnecessary, the Court rules as follows.

II. BACKGROUND AND FACTS

Plaintiff Zango is a software company whose product has been designated as potentially harmful or malicious software ("malware") by Defendant PC Tools's Spyware Doctor software. (Berretta Decl. ¶ 4 (Dkt. No. 7).) Plaintiff instituted this lawsuit to prevent Defendant from classifying its software in this manner and interfering with its operation on end-users' computers.

Defendant is an Australian company whose headquarters are located in Sydney, Australia.

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(Second Whitehead Decl. ¶ 1 (Dkt. No. 36).) It provides both free and for-purchase versions of its Spyware Doctor software. It distributes at least 700 copies of this software to Washington state residents every week. (*See* Pl.'s Opp'n 3-4 (Dkt. No. 34); Second Whitehead Decl. 2 n.1 (Dkt. No. 36).) Defendant generates approximately $550,000 in revenue from Washington customers a year. (Second Whitehead Decl. ¶ 4. (Dkt. No. 36).) Fees paid to Defendant through its website are processed by a German company. (*Id.* ¶ 5.) Defendant's free "Starter Edition" of its software is also bundled as part of the immensely popular "Google-Pack," and is widely distributed from the Google website to users around the world, including those in Washington. (Berretta Decl. ¶ 4 (Dkt. No. 7).) Those employees of Defendant who make the classification decisions for its anti-malware software are located in Sydney. (First Whitehead Decl. ¶ 2 (Dkt. No. 18).)

III. ANALYSIS

Plaintiff bears the burden of proving that jurisdiction exists. *Cubbage v. Merchent*, 744 F.2d 665, 667 (9th Cir. 1984). However, as the record now before the Court consists only of affidavits and discovery materials, Plaintiff need only make a prima facie case that jurisdiction exists. *Fields v. Sedgwick Assoc. Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986); *Vernon Johnson Fam. Ltd. Partnership v. Bank One Tex., N.A.*, 80 F. Supp. 2d 1127, 1130 (W.D. Wash. 2000). The Court resolves all factual disputes in Plaintiff's favor. *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000).

Personal jurisdiction can be general or specific. Both types of jurisdiction are available in Washington state. General jurisdiction is authorized by Wash. Rev. Code § 4.28.080(10). *See Crose v. Volkswagenwerk Aktiengesellschaft*, 558 P.2d 764, 766 (Wash. 1977). Specific jurisdiction is authorized by Washington's long-arm statute, Wash. Rev. Code § 4.28.185. These statutes provide jurisdiction to the extent constitutionally permissible under the Due Process Clause. *Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc.*, 1 F.3d 848, 851 (9th Cir. 1993) (quotations omitted). "Thus the statutory and constitutional standards merge into a single due process test." *Id.* (quotations omitted).

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A. Specific Jurisdiction

The Ninth Circuit employs a three-prong test to analyze personal jurisdiction.

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1205-06 (9th Cir. 2006) (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)). Each prong will be analyzed separately.

1. Purposeful Availment/Direction

The first prong of the specific jurisdiction analysis "may be satisfied by purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof." *Id.* at 1206.

The Court finds that Plaintiff purposefully directed its activities toward Washington. The Ninth Circuit employs the "effects" test to determine whether such purposeful direction has indeed occurred. *Id.* That test requires that "the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Id.* (quoting *Schwarzenegger*, 374 F.3d at 803). Defendant satisfied all three prongs by (1) selling via its website its anti-malware software (2) to Washington consumers, that (3) continually interferes with the operation of Plaintiff's software on those Washington-based computers. Although Defendant is correct that the majority of Plaintiff's claimed damages may not have occurred in Washington, the Ninth Circuit has explicitly "state[d] that the 'brunt' of the harm need not be suffered in the forum state." *Id.* at 1207. "If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state." *Id.* Nor does it matter that the transactions are "processed" by a German Internet company, given that Defendant itself procures the orders via its website.

2. Arising Out Of

The contacts constituting purposeful direction must be a "but for" cause of the current suit. *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1021 (9th Cir. 2002). Here, that requirement is met: but for the distribution of Defendant's software to Washington consumers, its software would not be blocking Plaintiff's software on those computers.

Defendant argues that the "gravamen" of Plaintiff's Complaint deals with the classification decision—which occurred in Sydney, Australia—and not with the decision to sell the software to Washington consumers. (Def.'s Reply 8 (Dkt. No. 35).) However, the "but for" causation analysis does not require that the sole cause of Plaintiff's claimed harm arise out of activities in the forum.

3. Reasonableness

The final prong of the specific jurisdiction analysis is that the exercise of jurisdiction "comports with traditional notions of fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). The burden is on Defendant to make a "compelling case" of unreasonableness. *Id.* at 476-77. The following seven factors are relevant to that determination:

> (1) the extent of a defendant's purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Rio Properties, Inc., 284 F.3d at 1021.

Defendant has failed to make a "compelling case" that the exercise of jurisdiction in Washington is unreasonable. Defendant purposefully interjected itself into Washington via its website and still continues to distribute significant amounts of its software to the state. While it is true that Plaintiff's software was classified as malware by employees in Australia, the majority of disputed facts in this case pertain to Plaintiff's Washington-based software—not to Defendant's software that blocks it. Many of the witnesses and other sources of evidence will thus be located in Washington, making it the most efficient forum for the resolution of this dispute.

Further, Defendant's burden on litigating in Washington is not so great as to demonstrate unreasonableness. While the Court is mindful of "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system," *Asahi Metal Ind. v. Superior Court*, 480 U.S. 102, 114 (1987), courts have long observed that "modern advances in communications and transportation have significantly reduced the burden of litigating in another country." *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1132-33 (9th Cir. 2003) (quoting *Sinatra v. National Enquirer*, 854 F.2d 1191, 1199 (9th Cir.1988)).

It is true that Australia provides an adequate alternative forum and that it has its own interest in litigating disputes involving its citizens. However, this Court sees no reason why Australia has a particular interest in adjudicating this dispute as opposed to any other conflict. Further, Washington has a countervailing interest on par with that of Australia in resolving disputes with respect to its citizens.

Accordingly, Plaintiff has failed to make a convincing case that the exercise of jurisdiction in Washington would be unreasonable. All prongs of the specific jurisdiction analysis have thus been met.

B. General Jurisdiction

Because the Court finds there is specific jurisdiction over Defendant, it is unnecessary to reach the issue of general jurisdiction at this time.

C. *Forum Non Conveniens*

"A district court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1177 (9th Cir. 2006) (citations omitted). "In exercising this discretion, a court will consider whether an adequate alternate forum exists and whether the balance of public and private interests favors a different forum." *Id.* Here, there is no dispute that Australia would provide an adequate alternative forum. Thus, the Court need only address the public and private factors.

The Court will "not disturb the plaintiff's original choice of forum unless the private interest and the public interest factors strongly favor dismissal." *Id.* at 1180 (quoting *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1145 (9th Cir. 2001) (internal quotations omitted). "[A] plaintiff need not select the optimal forum for his claim, but only a forum that is not so oppressive and vexatious to the defendant 'as to be out of proportion to plaintiff's convenience.'" *Id.* (quoting *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000)).

In analyzing the private factors, the Court is to examine "any or all" of the following factors:

> (1) the residence of the parties and witnesses, (2) the forum's convenience to the litigants, (3) access to physical evidence and other sources of proof, (4) whether unwilling witnesses can be compelled to testify, (5) the cost of bringing witnesses to trial, (6) the enforceability of the judgment, (7) any practical problems or other factors that contribute to an efficient resolution.

Tuazon, 433 F.3d at 1180. As indicated above, both Plaintiff and witnesses regarding its anti-malware software reside in Washington, making it the most efficient forum to resolve this dispute, even though Defendant and some witnesses may reside in Australia. All other factors are neutral or weigh in Plaintiff's favor. Thus, the private factors do not favor dismissal.

The relevant public factors are as follows: "(1) the local interest in the lawsuit, (2) the court's familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum." *Id.* at 1181. The Court finds that all of these factors are neutral or point in Plaintiff's favor. Accordingly, none of these factors favor dismissal.

Because Defendant has not met its burden of demonstrating that the balance of public and private factors favors dismissal, its motion to dismiss based on *forum non conveniens* is hereby denied.

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IV. CONCLUSION

For the foregoing reasons, Defendant's motion is DENIED in full.

SO ORDERED this31st day of July, 2007.

John C. Coughenour
United States District Judge